IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 85726
	)	
MARCUS BUSEY,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI
FIFTH JUDICIAL CIRCUIT, DIVISION ONE
THE HONORABLE RANDALL R. JACKSON, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

A Buchanan County jury convicted Appellant, Marcus Busey, of second-degree murder, Section 565.021,[1] second-degree robbery, Section 569.030, and two counts of armed criminal action, Section 571.015. The Honorable Randall R. Jackson sentenced Appellant to a total of forty years imprisonment. After the Western District Court of Appeals reversed Marcus' murder conviction and remanded for a new trial, this Court granted the State's transfer application pursuant to Rule 83.04, and it has jurisdiction over this cause pursuant to Article V, Section 10, Mo. Const. (as amended 1976).

[1] Statutory references are to RSMO 2000, unless otherwise indicated.

INTRODUCTION

Marcus did not testify at his trial, although he had planned to. He was compelled to change this aspect of his trial strategy in response to the State's untimely endorsement of Jamell Page on the fourth day of trial. In closing argument, the prosecutor asked the jury, "What witness said Marcus Busey could not testify? Not one single witness." (Tr. 1023). The State now urges that this was a permissible comment because defense counsel, unaware of a future untimely endorsement, had told the jury that Marcus would testify. It asks this Court to accept the premise that a prosecutor may ambush the defense with a late endorsement, and then punish the defendant's responsive strategy adjustment. Defense attorneys are not psychics, and the State cannot have it both ways.

The United States Supreme Court has instructed that "prosecutorial comment [upon a defendant's right not to testify] must be examined in context." ***United States v. Robinson*, 485 U.S. 25, 33, 108 S.Ct. 864, 869 (1988)**. This contextual examination is precisely what the Western District engaged in, but what the State now wants to ignore:

> Thus, the matter of whether the defense "opened the door" [to commentary on the defendant's failure to testify] must be viewed in the total context of the case. In this case, the prosecution and Page reached an agreement on Page's availability after Busey and the State were already well into the trial. In *these* circumstances, we cannot justify the prosecution's comment on the basis that the defense "opened the door." Slip op at 12-13 (emphasis in original).

When the State is wholly responsible for the unfair surprise, it should not be allowed to claim that the defense "opened the door."

STATEMENT OF FACTS

Mike Mason died from multiple stab wounds to the chest and abdomen (TR 701-717). The State argued that Jamell Page stabbed Mason to death during the course of a drug transaction in Mason's truck (Tr. 1027, 1071). In addition to charging Jamell with murder, the State also charged Appellant, Marcus Busey, as an accomplice (L.F. 41-54, Tr. 103).[2] The act of stabbing was attributed to Jamell alone (L.F. 146-148).

The procedural history

The codefendants' cases were severed for trial (Tr. 107-109). In its order granting severance, the trial court found that Jamell and Marcus's defenses were irreconcilable and that the jury's acceptance of one defense would tend to preclude the acquittal of the other (L.F. 108). The order also allowed the State to decide whether Jamell or Marcus would be tried first (L.F. 109). The State chose Marcus (Tr. 94).

On the first day of Marcus's trial, just moments before voir dire was to begin, the prosecutor approached Jamell's attorney in the hallway of the courthouse and extended a plea offer of 25 years for second degree murder and 15 years for armed criminal action, contingent upon Jamell testifying against Marcus (Tr. 731-734). Additionally, the prosecutor would agree to dismiss two other felony charges (Tr. 733). These terms had never been extended before (Tr. 755).

[2] The State also charged Marcus with second-degree robbery for taking Mike's cell phone, and two counts of armed criminal action, corresponding to the murder and the robbery (L.F. 41-54, Tr. 103).

Jamell's attorney told the prosecutor that he did not consider that to be much of an offer because of parole considerations (Tr. 733). The prosecutor thought Jamell's attorney was wrong on the amount of time that Jamell would have to serve before being paroled, and, during a break in Marcus's trial, he called the parole board to investigate (Tr. 733-735).

After extending this plea offer to Jamell, the prosecutor returned to the courtroom for Marcus's voir dire, where he informed Marcus's attorney about the plea offer (Tr. 94). Marcus's attorney immediately made a record, stating:

> This is very concerning to the defense. When we prepared for trial, Your Honor, we did not anticipate testimony by the co-defendant. So, therefore, voir dire, as well as questioning of witnesses...was not prepared in a way anticipating co-defendant's statements. I know that they are typically inadmissible, and so did not prepare that way, in that fashion (Tr. 94-95).

Defense counsel requested a continuance, stating, "this obviously is an issue that we would want to voir dire on the co-defendant testifying" (Tr. 95). She also told the court that the defense was at an "extreme disadvantage" if Jamell accepted the plea offer midway through trial because she would have lost the opportunity to do a proper voir dire, she could not question witnesses appropriately, and she would need to depose Jamell (Tr. 95-96). She reiterated that she had no reason to anticipate Jamell testifying when she "prepped the trial." (Tr. 96).

Since it was not clear at that time that Jamell would accept the plea offer, the trial court denied defense counsel's request for a continuance because it could not "see continuing the trial on, on a contingency which may never take place." (Tr. 97). The trial court agreed to "address those concerns" if Jamell later accepted a plea agreement (Tr. 97).

Proceeding with her prepared voir dire, defense counsel explored whether the jurors would hold anything against Marcus if he did not testify (Tr. 247). She told the prospective jurors that she "anticipate[d]" that Marcus was going to testify "sometime…depending on the course of the trial." (Tr. 247). She then queried whether anyone believed that they must hear from Marcus before they could find him not guilty (Tr. 247). In her opening statement, defense counsel foreshadowed evidence that they would present about Marcus' actions in the truck and other evidence about which Marcus would testify (Tr. 290-293).

Later that morning at Marcus's trial, Jamell's attorney passed a note to the prosecutor indicating a counter-offer of 18 years on the murder charge (Tr. 734). The prosecutor rejected that offer, but he called Jamell's attorney during the lunch break to discuss what he had learned from the parole board (Tr. 734-735). The prosecutor had found out that Jamell would serve to the parole date on his shorter sentence, and then start the next longest sentence (Tr. 736). His original offer of 25 and 15 years was still alive, and Jamell's attorney said that he would talk to Jamell again (Tr. 736).

That afternoon, Jamell's attorney passed another note to the prosecutor indicating that Jamell wanted to talk to his family that night, and that he would have an

answer the next morning (Tr. 737). There was no conditional acceptance at that point (Tr. 737).

Late Tuesday morning, on the second day of Marcus's trial, Jamell's attorney returned to the courtroom and passed another note to the prosecutor, indicating that, if the judge would be bound by the terms of the plea agreement, then Jamell would plead (Tr. 738-739). At the time this note was passed, the State's third witness, James Franklin, was testifying against Marcus (Tr. 741).

During the lunch break, the prosecutor talked to the victim's family about Jamell's plea offer and found that they were receptive to it (Tr. 742-743). Thereafter, Jamell's attorney and the prosecutor met with Judge Jackson in chambers (Tr. 743). Marcus's attorneys were not present (Tr. 593). Judge Jackson advised that they would take up Jamell's plea after Marcus's trial had adjourned for the day (Tr. 745).

After the lunch break, the prosecutor called five more witnesses during the afternoon session, for a total of nine witnesses at that point in Marcus's trial (Tr. 299-593). At 5:05 p.m., the prosecutor told Marcus's attorney for the first time that Jamell was scheduled to enter a plea (Tr. 593). Jamell entered his plea of guilty that evening (Tr. 608).[3] Marcus's attorneys were present at Jamell's plea, but Marcus was not (Tr. 727). On the morning of the third day of Marcus's trial, the prosecutor moved to

[3] Jamell's plea generated a substantial amount of media coverage, and two of Marcus's jurors ultimately had to be replaced with alternates because of their exposure to information about Jamell's plea (Tr. 690-694, 763-767, 1035-1038).

endorse Jamell as a witness in the State's case in chief and rebuttal (Tr. 610, 618).[4] The trial court agreed to hear evidence on the late endorsement at 1:00 p.m. (Tr. 612, 618-619).

At that hearing, Marcus's attorney called Jamell's attorney to testify about how Jamell's plea agreement with the prosecutor had developed (Tr. 728-760). Jamell's attorney testified that the terms of the final offer were the most advantageous that they had ever been, in that Monday morning was the first time that there had been any number of years attached to the plea offer (Tr. 745-746, 754-755). He agreed that he did not have authorization to talk about "specific terms of years" with the prosecutor until Monday morning (Tr. 756-757).

The trial court did not rule on the late endorsement of Jamell at that time, but instead decided to hear argument on the motion later that afternoon, so as not to keep the jury waiting (Tr. 758-760). Thereafter, the State called seven more witnesses, including the detective who took Marcus's first statement (Tr. 770-854).

After the jury had been released for the day, the trial court heard argument on the State's late endorsement of Jamell (Tr. 855-877). The prosecutor argued that he

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[4] In ruling upon the endorsement, the Court received State's Exhibit 48, a copy of Jamell's nine-page police statement (Tr. 725-726). The exhibit list at the front of the transcript does not show Exhibit 48 as offered or received, but it clearly was (Tr. 725-726). The State has provided Jamell's original statement, marked as Exhibit 3 for purposes of appeal (State's Ex. 3).

did not do anything to prompt Jamell's plea, nor did he do anything to purposefully and adversely affect the outcome of Marcus's trial (Tr. 856). He argued that the plea offer was a renewal from several months ago, that he had specific discussions about time periods after Jamell authorized his attorney to enter into negotiations, that he had no advantage over the defense because he had not been able to interview or prepare Jamell, and that Marcus's attorney had known about Jamell's nine-page police statement for months (Tr. 857, 860-863).

Marcus's attorney argued that the prosecutor purposefully manipulated Marcus' right to meaningfully confront his accusers, that defense counsel "lingered in ignorance" about Jamell's plea, and that the defense had been placed at an "irreparable disadvantage." (Tr. 864-869). The decision to allow late endorsement of Jamell would impact virtually every area of the defense case, from voir dire to opening statement -- where they told the jury that Marcus would testify-- and Marcus's ultimate decision to testify itself was affected (Tr. 869-870). Counsel argued that the State should not be allowed to endorse and use a critical eye witness in a murder case in the middle of trial (Tr. 872).

The trial court said that it was inclined to allow Jamell to testify in rebuttal, but that he would give his final ruling in the morning (Tr. 877-879). The next morning -- the fourth day of Marcus's trial -- the trial court issued its written order allowing the State to endorse Jamell for its rebuttal case only, with the restriction that he would be prohibited from testifying to any alleged statements of Marcus that were not previously disclosed in his nine-page statement (Tr. 880, L.F. 125-130). The trial court described

the prosecutor's initiation and timing of the plea negotiations as "unfortunate." (L.F. 127). The trial court suggested that the State "could have contacted Mr. Euler long before the morning of trial if it desired to engage in further plea negotiations" and then it could have presented Jamell's testimony pursuant to a timely endorsement (L.F. 127-128). It further found that Marcus's attorneys were "certainly surprised on the first morning of trial with the possibility of having to adjust their trial strategy to contend with the incriminating testimony of the co-defendant." (L.F. 128). "It was not until the end of the second day of trial that they were notified by the State that a plea, in fact, would be entered and a request for late endorsement would be made." (L.F. 128).

The trial court further ordered that the defense would be allowed to depose Jamell during the lunch break in Marcus's trial (Tr. 880). Defense counsel moved again to exclude Jamell's testimony entirely, or alternatively, to continue the trial until the next morning, so that defense counsel would have an opportunity to prepare for Jamell's deposition (Tr. 941-942).[5] Because she had been tied up in trial, she had no time to prepare for a deposition (Tr. 953). Further, defense counsel again argued that Marcus's defense was prejudiced by the Court's ultimate ruling because the defense "had already committed to a theory of defense in the months and months of preparation

[5] While defense counsel was busy at trial, her assistants in the public defender's office were "scrambling" to find a court reporter for Jamell's deposition (Tr. 949). Of course, they first had to go through the administrative steps necessary to acquire funds for a court reporter (Tr. 949).

for trial." (Tr. 954). There had been "absolutely no time for [defense counsel] to redirect her thoughts" (Tr. 954). Defense counsel reminded the trial court that she had requested a continuance immediately before voir dire when they first were told about the possibility of Jamell's plea (Tr. 954-955).

The trial court again overruled the motion to exclude Jamell's testimony and denied the request for a continuance until the next morning stating, "the Court has -- feels that it's accommodated giving additional time inasmuch as possible." (Tr. 955), and "it should not be necessary to further delay the interview and it will commence as scheduled at noon" (Tr. 956).

After deposing Jamell over the lunch hour, defense counsel determined that it would have to rest its case without presenting evidence (Tr. 957, 965). Before the jury returned to the courtroom, defense counsel called Marcus to the stand to make an offer of proof (Tr. 957). Marcus testified that he had always planned to testify at his trial in front of his jury (Tr. 957-961). This was consistent with his attorney's voir dire and opening statement, in which she told the jury that he would testify (Tr. 959-960). He no longer felt that he could testify based on the State's surprise late endorsement of Jamell (Tr. 959-961). Marcus did not testify (Tr. 957-965).

The evidence presented at trial

Marcus ultimately gave two statements to the police (Tr. 811-813, 920-923).[6] Neither statement contains an admission of guilt regarding the murder (Tr. 811-813,

[6] The statements are part of the record on appeal (Exhibits 2, 8, 9).

920-923). The second statement was given to Officer Wilson, [7] who had just finished interviewing Jamell (Tr. 901, 926-927). Officer Wilson noted that Marcus's first statement was inconsistent with Jamell's, so he volunteered to re-interview Marcus (Tr. 901, 905, 927-930). Marcus acknowledged his involvement in the robbery, but he denied any involvement in the murder (Tr.920-923).

On January 14, 2001, Jamell and Marcus met at "Twist's" house (Tr. 803, 811, 920). After awhile, Marcus called a friend, Tonya, to pick them up (Tr. 811, 920). Tonya does not have a car, so she called her friend, Michelle (Tr. 444, 491, 505-506). Michelle and her boyfriend, Ryan, took his car to pick up Tonya, and then they all went to pick up Marcus and Jamell (Tr. 444-447, 812).

Marcus told Ryan to drive to Tammy Franklin's house (Tr. 811, 920). Marcus and Tammy are not technically related, but Marcus' aunt has a relationship with Tammy's grandfather (Tr. 323, 358). When Marcus and Jamell got out of the car at Tammy's, Marcus told Ryan to drive around the block and wait because he and Jamell were going to buy some "weed" for everyone to use that night (Tr. 449, 506-507, 534, 811). Jamell went upstairs to Tammy's apartment to call Mike Mason, and Marcus followed shortly thereafter (Tr. 329-331, 360, 812). Jamell had done drug deals with Mike in the past (Tr. 490).

[7] Two of Marcus's brothers, Eric and Anthony, were previously convicted of assaulting Officer Wilson, but Wilson denied knowing Marcus before the interview (Tr. 905-908, 927).

Tammy's brother and sister-in-law, James and Seta Franklin, and another brother, Antrail Franklin, were also at the apartment (Tr. 321-322). James and Seta had temporarily moved to St. Joseph from Texas to "get away." (Tr. 321-322). James had recent convictions in Texas for marijuana possession and felony credit card abuse (Tr. 410). In exchange for their cooperation in Marcus's case, the police helped James and Seta move back to Texas (Tr. 359, 411). Their first statements to the police were not truthful (Tr. 356-358, 407-408, 410).

James and Seta were the State's sole witnesses as to what occurred in Tammy's apartment on the day Jamell murdered Mike (Tr. 325-340, 383-393). Earlier in the day, Marcus had come over and asked James to help him move in with Kate, the mother of Marcus' child (Tr. 382, 474, 522). When Marcus and Jamell arrived at Tammy's later that evening, Jamell made a phone call (Tr. 331, 360, 386). The Franklins heard Marcus and Jamell talking about buying drugs off of someone named Mike for less than full price, and if Mike did not give it to them, they would rob him (Tr. 330-332, 384-390).

According to the Franklins, Jamell was going to get in the passenger seat because he knew Mike better, and Marcus was going to get in behind Mike (Tr. 338, 389-391). If Mike would not give up the drugs, Marcus would put a pipe around his neck (Tr. 338, 390-391). They saw Marcus pull a knife from his coat and toss it to Jamell, after wiping it off (Tr. 334, 386-388). Seta had seen Jamell carrying this knife before (Tr. 361). Then, Marcus went downstairs and returned with a pipe, concealed in his sleeve (Tr. 337, 388).

When Mike arrived, Marcus and Jamell went out to the truck (Tr. 812). At one point, Seta said that she heard an engine revving like somebody was pushing on the gas real hard, and they could see the driver reaching for his neck (Tr. 341-344, 398). James and Seta were looking out the window of the apartment, but they could not tell how many people were inside the truck or what they were doing in the truck (Tr. 343-345). James was running from upstairs to downstairs trying to see what was happening (Tr. 401, 414, 416). James said that Antrail was looking outside through the downstairs door (Tr. 414). James could not see very well out of the upstairs window, so he ran downstairs, but Antrail was blocking James' view (Tr. 414-418). When he ran back upstairs, James said that he saw Marcus wiping down the inside and outside of the truck, and then he ran off (Tr. 401). They saw Jamell standing in the street over a body, and then Jamell ran (Tr. 405). Later, Marcus called Tammy's apartment and told them to stay inside and lock the door, and not to say anything (Tr. 348, 370).

A next door neighbor, Michael Moon, heard something outside (Tr. 428). He looked out of a small diamond-shaped window in his storm door and saw somebody running up the sidewalk in a hooded sweatshirt (Tr. 429-430). He also saw somebody lying in the street (Tr. 429, 433). Moon called 911 (Tr. 430, 433-434).

Police responded and found Mike Mason lying dead in the middle of the street (Tr. 546). There were no abrasions, scrapes, bruises or trauma in his neck area (Tr. 721). Several people were coming out of their houses, and officers called Seta Franklin over to identify the body, but she could not (Tr. 350).

After Jamell stabbed Mike, Marcus and Jamell arrived at Ryan's car that was parked around the corner (Tr. 449-452). They did not arrive together; Marcus was by himself and then Jamell walked up behind him (Tr. 451). They got into the car and instructed Ryan to go right, not left, away from the scene (Tr. 452). According to Michelle, neither Marcus nor Jamell was talking about a robbery or a stabbing (Tr. 458). Marcus just seemed to be acting "regular," but Jamell was acting "a little upset" (Tr. 458). Jamell is usually more talkative (Tr. 458). As they were driving away, someone threw a pipe out of the driver's side window (Tr. 452-454, 508).

The group stopped at a store to buy cigars and cigarettes and then went back to Ryan's house to smoke marijuana (Tr. 457-459, 510). Marcus used the telephone at Ryan's house (Tr. 459, 510-511). Michelle heard him yelling on the phone that everything was going to be okay and that he didn't do it (Tr. 461). Later, Michelle asked Marcus if he was scared, and he said, "why should I be scared, because I didn't do anything." (Tr. 461).

The next day, Ryan and Michelle picked up Tonya, Marcus, Jamell and Cody Grable (Tr. 463). They dropped Marcus off somewhere and then Jamell directed them to go down 15th Street, driving by where the murder occurred (Tr. 464-465). Jamell then had them drop him off on a corner somewhere (Tr. 465).

When Jamell got out, a knife had been left in the car (Tr. 465). It was wrapped in Michelle's pink shirt in the back dash (Tr. 466, 513). There were fingerprints on the knife, but Tonya took the shirt and rubbed the fingerprints off (Tr. 468-469, 513). Ryan later took the knife and buried it in the woods behind his house (Tr. 515, 520-

522). The knife was ultimately recovered after Ryan gave a statement to the police (Tr. 526-531). At the time of Marcus' trial, Ryan was on probation for tampering with physical evidence, and part of his plea agreement required him to testify against Marcus (Tr. 533).

Later that night, Marcus told Michelle to say that on the night of the murder, they had just picked up Marcus and gone back to Ryan's house, but not to say anything about Jamell (Tr. 476). Michelle gave this false statement to the police because she wanted to protect Marcus, and because nobody wanted to be held responsible for what Jamell had done (Tr. 491).

The closing argument

In his opening argument the prosecutor told the jury, "We heard in opening statement from Ms. Holt that we were going to hear something about, well, he [Marcus] borrowed the phone. There was no evidence presented--" (Tr. 994-995). The trial court sustained defense counsel's objection to this argument, agreeing that the only logical inference was that the evidence that was not presented could have come only from the defendant (Tr. 995-996). The trial court cautioned the prosecutor not to get into that area (Tr. 995-996).

Then, in his closing argument, the prosecutor asked the jury, "What witness said Marcus Busey could not testify? Not one single witness." (Tr. 1023). Defense counsel immediately objected and asked for a mistrial (Tr. 1023-1024). The trial court had not heard the statement, and in overruling the objection, it asked the prosecutor to clarify

the statement (Tr. 1024). The prosecutor continued his argument asking if any witness said that Marcus could not read (Tr. 1024).

The jury deliberated for just over five hours before returning guilty verdicts on all four counts (L.F. 162-165, Tr. 1045). The trial court sentenced Marcus to a total of forty years imprisonment (L.F. 202-204, Tr. 1078-1079). A timely notice of appeal was filed in the Western District Court of Appeals (Tr. 206-212).

The Western District Court of Appeals reversed Marcus' murder conviction and the armed criminal action associated therewith. It found that the prosecutor's direct comment on Marcus's failure to testify was erroneous, causing prejudice as to the murder and armed criminal action counts. In response to the State's motion for rehearing, that Court held that, in the context of the case, defense counsel did not "open the door" to such a reference by changing strategy in response to a mid-trial endorsement of Jamell. This Court granted the State's application for transfer, and this appeal follows.

POINTS RELIED ON

I.

The trial court abused its discretion by allowing the State's late endorsement of co-defendant, Jamell Page, on the morning of the 4th day of trial and ruling that he would be allowed to testify during the State's rebuttal case, or alternatively, by failing to grant a continuance to allow the defense to prepare a new trial strategy, in violation of Marcus' rights to due process, a fair trial, and to present a defense, as guaranteed by the 5th, 6th and 14th Amendments to the U.S. Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that the State's "unfortunate" timing in initiating plea negotiations with Jamell on the first morning of trial, caught Marcus's attorneys by surprise. They had developed a trial strategy that relied upon Jamell not being called at trial, as an unendorsed co-defendant, and their voir dire and opening statement -- telling the jury the Marcus would testify -- as well as their cross-examination of witnesses, reflected a drastically different defense than the one that they ultimately had to present in response to trial court's ruling. The defense had no time to rethink their strategy on the 4th day of trial, nor did the court grant them a continuance to give them time to regroup, prepare for Jamell's deposition and contemplate recalling witnesses, resulting in the failure to present its announced defense and the denial to Marcus of a fundamentally fair trial.

State v. Stokes, 638 S.W.2d 715 (Mo. banc 1982);

People v. Rode, 196 Mich. App. 58, 492 NW2d 483 (1992);

State v. Storey, 40 S.W.3d 898 (Mo. banc 2001);

State v. Scott, 943 S.W.2d 730 (Mo. App., W.D. 1997);

U.S. Const., Amends 5, 6, & 14;

Mo. Const., Art. I, Sections 10 & 18(a); and

Rule 23.01(f).

II.

The trial court abused its discretion in overruling Marcus's motion for mistrial after the prosecutor asked the jury during his closing argument, "What witness said Marcus could not testify? Not one single witness." This argument violated Marcus's rights to due process, a fair trial before a fair and impartial jury, and to not be penalized for not testifying, guaranteed by the U.S. Const., Amendments 5, 6, & 14th, Art. I, §§ 10, 18(a) & 19 of the Mo. Const., Section 546.270, and Rule 27.05(a), in that, 1) the trial court had already sustained one defense objection and had admonished the prosecutor to refrain from commenting on Marcus's right not to testify; and 2) although Marcus had planned to testify, the State's late endorsement forced him to change that strategy, and under these circumstances, defense counsel did not "open the door" to such comment.

Griffin v. California, 380 U.S. 609 (1965);

United States v. Robinson, 485 U.S. 25 (1988);

State v. Neff, 978 S.W.2d 341 (Mo. banc 1998);

State v. Bulloch, 785 S.W.2d 753 (Mo. App., E.D. 1990);

U.S. Const., Amends 5, 6, 14;

Mo. Const., Art. I, Sections 10, 18(a) & 19;

Section 546.270; and

Rule 27.05(a).

ARGUMENT

I.

The trial court abused its discretion by allowing the State's late endorsement of co-defendant, Jamell Page, on the morning of the 4th day of trial and ruling that he would be allowed to testify during the State's rebuttal case, or alternatively, by failing to grant a continuance to allow the defense to prepare a new trial strategy, in violation of Marcus' rights to due process, a fair trial, and to present a defense, as guaranteed by the 5th, 6th and 14th Amendments to the U.S. Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that the State's "unfortunate" timing in initiating plea negotiations with Jamell on the first morning of trial, caught Marcus's attorneys by surprise. They had developed a trial strategy that relied upon Jamell not being called at trial, as an unendorsed co-defendant, and their voir dire and opening statement -- telling the jury the Marcus would testify -- as well as their cross-examination of witnesses, reflected a drastically different defense than the one that they ultimately had to present in response to trial court's ruling. The defense had no time to rethink their strategy on the 4th day of trial, nor did the court grant them a continuance to give them time to regroup, prepare for Jamell's deposition and contemplate recalling witnesses, resulting in the failure to present its announced defense and the denial to Marcus of a fundamentally fair trial.

The Facts

Marcus and Jamell's cases were severed for trial because their defenses were inconsistent (L.F. 107-109). The State chose to try Marcus first (L.F. 108-109, Tr. 94). On the first day of Marcus's trial, just before voir dire, the prosecutor approached Jamell's attorney in the hallway of the courthouse and extended a plea offer of 25 years for second-degree murder and 15 years for armed criminal action, contingent upon Jamell testifying against Marcus (Tr. 731-734). He also offered to dismiss the robbery count and a corresponding count of armed criminal action (Tr. 733). These specific terms had never been extended before (Tr. 755).

Then, the prosecutor returned to the courtroom for voir dire and told Marcus's attorney that he had extended a plea offer to Jamell (Tr. 94). Marcus's attorney immediately made a record, stating:

> This is very concerning to the defense. When we prepared for trial, Your Honor, we did not anticipate testimony by the co-defendant. So, therefore, voir dire, as well as questioning of witnesses...was not prepared in a way anticipating co-defendant's statements. I know that they are typically inadmissible, and so did not prepare that way, in that fashion (Tr. 94-95).

Marcus's attorney requested a continuance, stating, "this obviously is an issue that we would want to voir dire on the co-defendant testifying" (Tr. 95). She also told the court that the defense was at an "extreme disadvantage" if the plea offer was accepted later because she would have lost the opportunity to do a proper voir dire, she

could not question witnesses appropriately, and she would need to depose Jamell (Tr. 95-96). She told the Court that she did not anticipate Jamell testifying when she "prepped the trial." (Tr. 96).

Since it was not clear at that time that Jamell would accept the plea offer, the trial court denied defense counsel's request for a continuance (Tr. 97). It could not "see continuing the trial on, on a contingency which may never take place." (Tr. 97). The trial court agreed to "address those concerns" if Jamell took the plea (Tr. 97).

During voir dire, defense counsel explored whether the jurors would hold anything against Marcus if he did not testify (Tr. 247). She told the prospective jurors that she "anticipate[d]" that Marcus was going to testify "sometime…depending on the course of the trial." (Tr. 247). She then queried whether anyone believed that they must hear from Marcus before they could find him not guilty (Tr. 247). In her opening statement, defense counsel foreshadowed evidence that they would present about Marcus' actions in the truck and other evidence about which Marcus would testify (Tr. 290-293).

Jamell's attorney and the prosecutor continued to negotiated a plea agreement by passing notes back and forth during the first two days of Marcus's trial (Tr. 733-737). Jamell's attorney passed a note making a counter-offer of 18 years on the murder charge, which the prosecutor rejected (Tr. 734). During a lunch break, the prosecutor called the parole board and then re-contacted Jamell's attorney (Tr. 735). The prosecutor learned that Jamell would go to the parole date on his shorter sentence, and

then start the next longest sentence (Tr. 736). The original offer of 25 and 15 years was still alive, and Jamell's attorney said that he would talk to Jamell again (Tr. 736).

During the afternoon session of trial, Jamell's attorney passed another note to the prosecutor indicating that Jamell wanted to talk to his family that night, and that he would have an answer the next morning -- Tuesday (Tr. 737). He had not conditionally accepted the offer at that point (Tr. 737).

On the morning of the second day of Marcus's trial, Jamell's attorney passed another note to the prosecutor, indicating that if the judge would be bound by the terms of the plea agreement, then Jamell would plead (Tr. 738-739). During the lunch break, the prosecutor and Jamell's attorney went to the judge's chambers to discuss the plea (Tr. 743). Marcus' attorneys were not present (Tr. 593). They decided to take up Jamell's plea after Marcus's trial had adjourned for the day (Tr. 745).

After the lunch break, the prosecutor called five more witnesses during the afternoon session, for a total of nine witnesses at that point in the trial (Tr. 299-593). At 5:05 p.m. that day, the prosecutor told Marcus's attorney for the first time that Jamell was scheduled to enter a plea (Tr. 593). Jamell entered his plea of guilty that evening (Tr. 608).[8] The next morning, the third day of trial, the prosecutor moved to

[8] Jamell's plea generated a substantial amount of media coverage, and two of Marcus's jurors ultimately had to be replaced with alternates because of their exposure to information about Jamell's plea (Tr. 690-694, 763-767, 1035-1038).

endorse Jamell as a witness in the State's case in chief and rebuttal (Tr. 610, 618).[9] The trial court agreed to hear evidence on the endorsement at 1:00 p.m. (Tr. 612, 618-619).

Marcus's attorney called Jamell's attorney to testify about how Jamell's plea agreement with the prosecutor developed (Tr. 728-760). He testified that the terms of the final offer were the most advantageous that they had ever been, in that Monday morning was the first time that there had been any number of years attached to the plea offer (Tr. 745-746, 754-755). He agreed that he did not have authorization to talk about "specific terms of years" with the prosecutor until Monday morning (Tr. 756-757). The trial court did not rule on the endorsement then, but decided to hear argument on the motion later that afternoon, so as not to keep the jury waiting (Tr. 758-760).

After the jury was released for the day, the State argued that it did not do anything to prompt Jamell's plea, nor did he do anything to purposefully and adversely affect the outcome of Marcus' trial (Tr. 855-877). He further stated that the plea offer was only a renewal from several months ago, that he had specific discussions about

[9] In ruling upon the endorsement, the Court received State's Exhibit 48, a copy of Jamell's nine-page police statement (Tr. 725-726). The exhibit list at the front of the transcript does not show Exhibit 48 as offered or received, but it clearly was (Tr. 725-726). The State has provided Jamell's original statement, marked as Exhibit 3 for purposes of appeal (State's Ex. 3).

time periods after Jamell authorized his attorney to enter into negotiations, he was not in a more advantageous position than the defense because he had not been able to interview or prepare Jamell, and that defense counsel knew about Jamell's nine-page statement months ago (Tr. 857, 860-863).

Defense counsel argued that the prosecutor purposefully manipulated Marcus' right to meaningfully confront his accusers, that defense counsel "lingered in ignorance" about Jamell's plea, and that the defense had been placed at an "irreparable disadvantage." (Tr. 864-869). The decision to allow late endorsement of Jamell would impact virtually every area of the defense case, from voir dire to opening statement, and Marcus's ultimate decision to testify itself was affected (Tr. 869-870). It argued that the State should not be allowed to endorse and use a critical eye witness in a murder case in the middle of trial (Tr. 872).

The trial court said that it was inclined to allow Jamell to testify in rebuttal, but that it would give its final ruling in the morning (Tr. 877-879). The next morning -- the 4th day of trial -- the trial court issued its written order allowing the State to endorse Jamell for its rebuttal case only, with the restriction that he would be prohibited from testifying to any alleged statements of Marcus that were not previously disclosed in his nine-page statement (Tr. 880, L.F. 125-130). In its order, the trial court described the initiation and timing of the plea negotiations as "unfortunate." (L.F. 127). It suggested that the State "could have contacted [Jamell's attorney] long before the morning of trial if it desired to engage in further plea negotiations" and then it could have presented Jamell's testimony pursuant to a timely endorsement (L.F. 127-128). The trial court

specifically found that Marcus's attorneys were "certainly surprised on the first morning of trial with the possibility of having to adjust their trial strategy to contend with the incriminating testimony of the co-defendant." (L.F. 128). "It was not until the end of the second day of trial that they were notified by the State that a plea, in fact, would be entered and a request for late endorsement would be made." (L.F. 128).

The trial court further ordered that the defense would be allowed to depose Jamell during the lunch break in Marcus's trial (Tr. 880). Defense counsel moved again to exclude Jamell's testimony entirely, or alternatively, to continue the trial until the next morning, so that defense counsel would have an opportunity to prepare for Jamell's deposition (Tr. 941-942). She had been tied up in trial and had no time to prepare for a deposition (Tr. 953). Further, defense counsel again argued that Marcus's defense was prejudiced by the Court's ultimate ruling because the defense "had already committed to a theory of defense in the months and months of preparation for trial." (Tr. 954). There had been "absolutely no time for [defense counsel] to redirect her thoughts" (Tr. 954).

The trial court again overruled the motion to exclude Jamell's testimony and denied the request for a continuance until the next morning stating, "the Court has -- feels that it's accommodated giving additional time inasmuch as possible." (Tr. 955), and "it should not be necessary to further delay the interview and it will commence as scheduled at noon" (Tr. 956).

After deposing Jamell over the lunch hour, defense counsel determined that she would have to rest her case without presenting evidence (Tr. 957, 965). Before the jury

returned to the courtroom, defense counsel called Marcus to the stand to make an offer of proof (Tr. 957). Marcus testified that he had always planned to testify at his trial in front of his jury (Tr. 957-961). This was consistent with his voir dire and opening statement, in which his attorney alluded to his testimony (Tr. 959-960). He no longer felt that he could testify based on the State's surprise request for late endorsement of Jamell Page (Tr. 959-961).

Analysis

Rule 23.01(f) allows the State to endorse additional witnesses after "notice to the defendant upon order of the court." The trial court, in its discretion, may permit the late endorsement of witnesses. ***State v. Allen*, 710 S.W.2d 912, 915 (Mo. App., W.D. 1986)**. The trial court, in exercising its discretion, should consider many factors including: 1) whether the defendant waived the objection, 2) whether the state surprised the defendant or acted in bad faith with an intent to disadvantage the defendant, 3) whether in fact the defendant was surprised and suffered any disadvantage and, 4) whether the type of testimony given might readily have been contemplated. ***State v. Stokes*, 638 S.W.2d 715, 719 (Mo. banc 1982)**. However, the main consideration is whether the late endorsement of witnesses resulted in fundamental unfairness or prejudice to substantial rights of the defendant. ***State v. Thomas*, 965 S.W.2d 396, 399 (Mo. App., S.D. 1998).**

In ***State v. Storey*, 40 S.W.3d 898, 907 -908 (Mo. banc 2001)**, the Missouri Supreme Court addressed the late endorsement of witness, saying, "[t]rial courts should take care to protect the integrity of our process from such sloppy or disingenuous

tactics." The trial court in the present case took its obligation very seriously, but nonetheless, crafted an inappropriate remedy under the specific circumstances of this case. A new trial is warranted when there is no doubt that Marcus' counsel would have done things differently and that a different result might otherwise have occurred. ***Storey*, 40 S.W.3d at 908**.

An analysis of the above four factors, under the specific facts of Marcus's case, reveals that the untimely endorsement of Jamell Page resulted in fundamental unfairness and prejudice to Marcus's rights.

First, defense counsel did not waive the objection. Indeed, she preserved her objection to the late endorsement early and often. She requested a continuance when it was first revealed that the State had initiated plea negotiations with Jamell on the morning of trial, and she objected when the State ultimately moved to endorse Jamell (Tr. 94-97, 864-872, 941-942, 953-954). She also moved for a continuance to allow herself time to regroup, if that was possible, and to prepare for Jamell's deposition (Tr. 953-954). Essentially, counsel was forced into frenzied damage control.

Second, there is no doubt that the state surprised defense counsel with the late endorsement -- the trial court specifically found that it did (L.F. 125-130). While the trial court did not believe that the prosecutor acted in bad faith with an intent to disadvantage the defendant (L.F. 127), the circumstances certainly suggest otherwise. Even the trial court acknowledged that the State's timing in initiating plea negotiations with the attorney for the co-defendant on the first morning of trial was "unfortunate." (L.F. 127). It stated explicitly that "the State could have contacted Mr. Euler long

before the morning of trial if it desired to engage in further plea negotiations" (L.F. 127-128). Regardless of whether the prosecutor intended to disadvantage the defense with the untimely endorsement, the resulting prejudice was the same.

Third, not only was the defense surprised, but it was also placed at an extreme disadvantage. The defense had alluded to the jury during voir dire and opening statement that Marcus would testify. The surprise endorsement of Jamell drastically changed that announced theory of defense, forcing Marcus not to testify. The defense could not go back in time and change its announced strategy, nor did it have time to prepare to depose Jamell, or rethink its cross-examination of State's witnesses in light of what Jamell would say.

State v. Scott*, 943 S.W.2d 730 (Mo. App., W.D. 1997)** bears a striking similarity to the present case and is persuasive on the issue of prejudice. The trial judge in *Scott*, during the State's case, on the second day of trial, was presented with the state's nondisclosure of inculpatory statements of the defendant and was thrust into tailoring a remedy fair to all. ***Scott*, 943 S.W.2d at 736**. Like the trial court in ***Scott, there is no doubt that Marcus's trial judge took very seriously his obligation to fashion an appropriate remedy, as reflected in his five-page order (L.F. 125-130). The remedy he chose, however, did not eliminate the prejudice under the facts of this case.

Scott's defense counsel was surprised by the state's attempt to admit into evidence undisclosed admissions by his client. ***Id.*** Counsel made an immediate record as to how he had committed to the trial strategy which included having his client testify. ***Id.*** Counsel had promised the jury that Scott would take the stand. ***Id.*** But,

under the trial court's remedy, if Scott took the stand, then the state, in rebuttal, could call two witnesses to testify as to Scott's contradictory statements to them, which amounted to admissions of guilt. ***Id.*** Therefore, counsel chose to proceed and not call his client to the stand. ***Id.***

While the damning evidence was never presented to the jury because Scott did not testify, the trial court's ruling affected the defendant's trial strategy, and his announced decision to testify. ***Id.*** The timing of when the evidence came to light in the course of the trial made a difference on the question of prejudice. ***Id.*** After the jury was advised that the defendant would be testifying, defense counsel's strategy was at risk. ***Id.***

This analysis of prejudice applies here as well. Once Marcus's attorney had told the jury, both in voir dire and opening statement, that Marcus would testify, her strategy was at risk. Allowing late endorsement on the 4th day of trial, even limited to the extent that it was, could not cure the harm from what had already occurred earlier in the trial.

Additionally, counsel made a complete record, by calling Marcus to testify in an offer of proof, that he had always planned to testify, but that the State's late plea negotiations with Jamell and the Court's ruling on the late-endorsement forced him to conclude that he could not to take the stand.

In ***Scott***, this Court acknowledged that "the trial judge levied a severe sanction," but nonetheless ruled that "exclusion of the inculpatory statement during the state's case was not sufficient to remove the prejudice to the defendant in preparing for and

trying the case" and ordered a new trial. ***Id.* at 739**. The same is true here. Marcus, just like Scott, was denied the opportunity to prepare to testify and to be cross-examined. ***Id.***

The trial court was faced with a dilemma, reflected in its order, of trying to fashion a remedy well into the trial, after strategy had been laid out by the defendant (L.F. 125-130). While Marcus' judge, just like Scott's judge, did the best he could under the circumstances, the sanction imposed did not remove the prejudice and restore to Marcus the right to a defense. ***Id.*** Marcus had a right to have the opportunity to formulate a defense *in advance of trial*. ***Id.*** The trial court was right, when it stated that, "The State could have contacted Mr. Euler long before the morning of trial if it desired to engage in further plea negotiations and eventually, be able to present the testimony of Jamell Page at trial pursuant to a timely endorsement." (L.F. 127-128). The trial court acknowledged that Marcus's defense team was "certainly surprised on the first morning of trial with the possibility of having to adjust their trial strategy to contend with the incriminating testimony of the codefendant." (L.F. 128). "It was not until the end of the second day of trial that they were notified by the State that a plea, in fact, would be entered and a request for late endorsement would be made." (L.F. 128). In fact, that request was not officially ruled on until the 4th day of trial (Tr. 880).

The final consideration is whether the type of testimony given might readily have been contemplated. Here, the trial court restricted Jamell's testimony to the statements that were made in his nine-page statement to the police that had been disclosed to the defense in discovery (L.F. 125-130). While the defense knew the

substance of Jamell's testimony, the prejudice resulted from the fact that they had no reason to anticipate or prepare their case in contemplation of Jamell's testimony. They knew that he was an unendorsed codefendant who was awaiting trial. They knew that he was not going to be called at trial, and they did not prepare for that eventuality. Marcus made his decision to testify knowing that Jamell would not be a witness against him, voir dire was conducted with that in mind, witnesses who knew Jamell (James, Seta, Michelle and Ryan) were not cross-examined in anticipation of Jamell testifying, nor did the defense have an opportunity to prepare for Jamell's deposition.

In ***People v. Rode,* 196 Mich. App. 58, 67-68, 492 NW2d 483 (1992) (rev'd on other grounds 447 Mich. 325, 524 NW2d 682 (1994))**, the Defendant contended that the trial court erred in permitting the prosecution to amend its witness list on the first day of trial to endorse his codefendant. In allowing the amendment, the trial court stated that defendant's preparation for trial was not affected because he knew what the codefendant was going to testify to at trial. ***Id.*** On appeal, the Court found that the trial court abused its discretion in allowing the untimely endorsement. ***Id.*** Given the trial court's acknowledgment that the co-defendants had antagonistic defenses, Defendant Rode expected that his jury would not hear the codefendant's testimony, and he prepared for trial in light of that. ***Id.*** As a result of the untimely endorsement, he was forced to significantly change his strategy. ***Id.***

Marcus was similarly prejudiced. His attorneys had no reason to figure Jamell's testimony into their trial strategy equation. Jamell was an unendorsed, represented codefendant with no deal from the State.

Denial of continuance

When the trial court denied her motion to exclude Jamell from testifying at all, defense counsel again asked for a continuance. She simply requested a recess from noon until 9:00 a.m. the next morning, so that she could have time to prepare for Jamell's deposition and "redirect her thoughts." (Tr. 952-955). The trial court denied this short continuance and ordered Jamell's deposition to begin in an hour (Tr. 956).

The decision to grant a continuance is within the sound discretion of the trial court. ***State v. Wolfe*, 13 S.W.3d 248, 261 (Mo. banc 2000)**. Reversal is warranted only upon a very strong showing that the court abused its discretion and prejudice resulted. ***State v. Middleton*, 995 S.W.2d 443, 465 (Mo. banc 1999)**. A continuance for counsel's trial preparation is not warranted when counsel had adequate time to prepare. ***State v. Christeson*, 50 S.W.3d 251, 261-262 (Mo. banc 2001).** Obviously, defense counsel did not have adequate time to prepare. She was surprised by the late endorsement, she had no chance to regroup and reevaluate her announced trial strategy in light of the endorsement, she had no time to prepare for Jamell's deposition before it took place during a lunch recess on the 4th day of trial (indeed, she was lucky to obtain a court reporter's presence at the deposition – Tr. 949), she had no chance to consider recalling witnesses that had been excused from trial before the endorsement was announced, and she had no time to prepare her client.

The overarching question on appeal is whether Marcus received a fair trial. This Court cannot be convinced, in light of the specific facts of this case, that a fair trial resulted. It must reverse Marcus's convictions and remand for a new trial.

II.

The trial court abused its discretion in overruling Marcus's motion for mistrial after the prosecutor asked the jury during his closing argument, "What witness said Marcus could not testify? Not one single witness." This argument violated Marcus's rights to due process, a fair trial before a fair and impartial jury, and to not be penalized for not testifying, guaranteed by the U.S. Const., Amendments 5, 6, & 14th, Art. I, §§ 10, 18(a) & 19 of the Mo. Const., Section 546.270, and Rule 27.05(a), in that, 1) the trial court had already sustained one defense objection and had admonished the prosecutor to refrain from commenting on Marcus's right not to testify; and 2) although Marcus had planned to testify, the State's late endorsement forced him to change that strategy, and under these circumstances, defense counsel did not "open the door" to such comment.

In his opening argument the prosecutor told the jury:

> We heard in opening statement from Ms. Holt that we were going to hear something about, well, he [Marcus] borrowed the phone. There was no evidence presented--

(Tr. 994-995). The trial court sustained defense counsel's objection to this argument because, clearly, there were only three people that could testify about whether Marcus borrowed Mike's phone: Mike (who was deceased), Jamell (who was precluded from testifying) and Marcus. While defense counsel did indicate in her opening statement

that Marcus would testify (Tr. 290-293), that strategy was thwarted due to the State's late endorsement of Jamell (Tr. 957-960). The prosecutor's own untimely endorsement forced defense counsel into a new strategy which involved Marcus not testifying, and yet, the prosecutor attempted to capitalize on this lack of testimony by telling the jury that "There was no evidence presented." (Tr. 994-995).

The trial court was correct when it said that the only logical inference was that the evidence that was not presented could have come only from Marcus (Tr. 996). The trial court sustained defense counsel's objection and cautioned the prosecutor not to get into that area (Tr. 996).

However, in his final argument, the prosecutor asked the jury, "What witness said Marcus Busey could not testify? Not one single witness." (Tr. 1023). Defense counsel immediately objected and moved for a mistrial (Tr. 1023-1024). The trial court had not heard the statement, and in overruling the objection, it asked the prosecutor to clarify his statement (Tr. 1024). The prosecutor continued his argument asking if any witness said that Marcus could not read (Tr. 1024).

Whether a particular improper statement is so prejudicial under the facts in a particular case is largely within the discretion of the trial court. ***State v. Pope*, 50 S.W.3d 916, 922 (Mo. App., W.D. 2001)**. Appellate review is for an abuse of discretion. ***Id.*** When the trial court takes prompt and appropriate remedial action to protect the defendant by instructing the jury to disregard the remark, a mistrial is generally not warranted. ***State v. Neff*, 978 S.W.2d 341, 345 (Mo. banc 1998).** Here, however, the trial court gave no limiting instruction and it overruled Marcus's request

for a mistrial. Given its prior warning to stay away from this type of argument, if the trial court had realized that the prosecutor had made another direct reference to Marcus's right not to testify, it surely would have given a limiting instruction or granted a mistrial.

It has long been recognized that any reference to the fact a criminal defendant did not testify is strictly forbidden. ***Griffin v. California*, 380 U.S. 609, 615, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106 (1965)**. The Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard," and the privilege is fulfilled only when a criminal defendant is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ... for such silence." ***Estelle v. Smith*, 451 U.S. 454, 467-468, 101 S.Ct. 1866, 1875 (1981)** (citations omitted). This constitutional prohibition, however, does not preclude a prosecutor from making "a *fair* response to a claim made by defendant or his counsel." ***United States v. Robinson***, 485 U.S. 25, 43, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988) (emphasis added). Because the State's untimely endorsement provoked Marcus into not testifying, the prosecutor's direct reference was not a "fair" response to defense counsel's opening statement.

Missouri courts have also long held that comments on the exercise of the defendant's right not to testify are forbidden. ***State v. Neff*, 978 S.W.2d at 344**; *see also* **Section 546.270 RSMo 2000; Rule 27.05(a)**. Such references are prohibited because they violate a defendant's freedom from self-incrimination and right not to testify as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution

and Article I, Section 19 of the Missouri Constitution. ***State v. Jackson,* 792 S.W.2d 21, 23 (Mo.App. E.D. 1990)** ("It is an elemental precept that remarks which call the jury's attention to whether the defendant testifies or which influence the defendant to testify are proscribed"). The purpose of the rule is obvious: to keep from the jury any hint of the constitutional right against self-incrimination. ***State v. Cockrum*, 592 S.W.2d 300, 302 (Mo.App., E.D. 1979**). References which include "defendant" and "testify," or their equivalents, constitute reversible error. ***State v. Gleason,* 813 S.W.2d 892, 897 (Mo. App., S.D. 1991)**.

Section 546.270 and **Rule 27.05(a)** strictly proscribe direct and certain references to the defendant's failure to testify. ***State v. Sidebottom*, 753 S.W.2d 915, 920 (Mo.banc 1988)**. A direct reference will use words such as "testify," "accused," or "defendant" or their equivalent. ***State v. Richardson*, 923 S.W.2d 301, 314 (Mo.banc 1996)**; ***State v. Bulloch,* 785 S.W.2d 753, 755 (Mo. App., E.D. 1990)**. There is no question that the prosecutor's comment here was a "direct reference." He used the words "Marcus Busey" and "testify." (Tr. 193). "What witness said Marcus Busey could not testify? Not one single witness." (Tr. 193).

In ***State v. Neff, supra,*** this Court stated that "[o]bviously, if an objection to a prosecutor's direct reference is made and overruled, a new trial will be ordered on appeal." **978 S.W.2d at 345.** That is precisely what happened here. The prosecutor made a direct reference, defense counsel objected and the trial court overruled the objection (Tr. 1023). Such comment mandates the declaration of a mistrial if one is requested. ***Bulloch,* 785 S.W.2d at 755**.

In ***Jackson, supra,*** the defendant stood trial for purchasing shoes with a stolen credit card. **792 S.W.2d at 21**. While cross-examining the sales clerk, defense counsel asked her if she could identify the defendant's shoe size just by looking at him. ***Id.*** **at 22**. The following exchange then occurred:

> [Defense Counsel]: Mark [the defendant], why don't you stand up.
>
> [Witness]: Um-hum.
>
> [Defense Counsel]: What size shoes are these?
>
> [Witness]: I would say 9 and a half or ten.
>
> [Defense Counsel]: Are they, Mark?
>
> THE DEFENDANT: What size are they?
>
> [Prosecutor]: Well, Judge, wait. I'm going to object at this point.
>
> THE COURT: Sustained.
>
> [Defense Counsel]: What's the objection?
>
> [Prosecutor]: Not a proper foundation, first off. They're his shoes. ***If he wants to testify concerning the size of his shoes, he can.*** It's improper.

Id. **at 23** (emphasis added).

In that case, as here, the defense moved for a mistrial, which was denied. The court of appeals reversed, stating,

> We hold that the prosecutor's remark that "[i]f [defendant] wants to testify . . . he can" constituted a direct infringement upon the defendant's basic constitutionally right against self-incrimination. The statement not only called

> the jury's attention to defendant's subsequent failure to testify at trial but also could be perceived as a challenge to induce defendant to testify.

Id. The Court held that the trial court prejudicially erred and should have granted the motion for a mistrial. ***Id.*** Just as the trial court erred to the defendant's prejudice in ***Jackson***, the court below prejudicially erred in this case.

In ***State v. Chunn, supra,*** the state commented: "'How can you…*the defendant*, *explain* a tire tool in the car.'" The court held that the state made a direct reference to the defendant's failure to testify:

> The word defendant is specifically used. As the statement was made during final closing argument there was no way defendant or his attorney could offer an explanation. ***Even though the statement may have been a rhetorical question, we believe the prosecutor's challenge was a direct reference to defendant's failure to testify at trial. As such, the statement violates defendant's rights and requires a new trial.***
>
> * * * * *
>
> In the case at bar, the prosecutor's statement was a direct reference to the defendant's failure to testify, was directed to the jury, was made during closing argument, no other than the defendant could answer the prosecutor's question and the statement was prejudicial to the accused as it violated a constitutional right.

***Chunn*, 657 S.W. 2d at 294-95** (emphasis added).

Also controlling is ***Bulloch, supra***. In that case, the prosecutor commented in closing argument that the jury had not heard about what made the defendant sufficiently angry to commit the offense. **785 S.W.2d at 755**. Bulloch's counsel objected, and at sidebar moved for a mistrial. ***Id.*** The trial court sustained the objection, ordered the jury to disregard the comment, but denied the motion for mistrial. ***Id.*** Nonetheless, on appeal the Court reversed Bulloch's conviction and remanded for a new trial, stating that the direct and certain reference to the defendant's failure to testify required reversal. ***Id.***

In ***State v. Elliott,* 735 S.W.2d 173 (Mo. App., S.D. 1987)**, the court held that "the use of key words such as 'defendant' and 'testify' is important in determining the prejudicial effect." ***Id*. at 175**. While such words are not an automatic trigger, the effect of the statement must be discerned from the "overall context of their usage." ***Id.*** In ***Elliott***, the prosecutor "misspoke the word 'defendant' instead of 'witness' ..." ***Id.*** The court held that such a "slip of the tongue" was understood by all as such and did not prejudice Elliott's defense. ***Id.*** However, the court recognized that "clearly a comment made directly to the jury by the prosecutor during opening statement or closing argument would have a greater impact..." ***Id.*** That is precisely what happened in Marcus's case.

The basis of the State's transfer application to this Court is that the prosecutor's direct reference to Marcus's failure to testify was a permissible one because defense counsel, in voir dire and opening statement, had promised the jury that Marcus would testify. But to apply this exception, this Court must find that the prosecutor's comment

was a "*fair* response" when examined "in context." ***United States v. Robinson,* 485 U.S. at 25, 108 S.Ct. at 867.**

In ***Robinson***, defense counsel mentioned several times in his closing argument that the government did not allow the defendant, who did not testify, to explain his side of the story and had unfairly denied him the opportunity to explain his actions. The prosecutor in rebuttal remarked that the defendant "could have taken the stand and explained to you anything he wanted to. The United States of America has given him, throughout, the opportunity to explain." **108 S.Ct. at 867.** The Supreme Court held the prosecutor's statements, in light of defense counsel's comments, did not infringe upon the defendant's Fifth Amendment rights.

The prosecutor's comment in the present case was not a "fair response" to anything said by defense counsel. The context in this case shows that the State made an untimely endorsement midway through trial which prompted defense counsel to restructure her entire trial strategy. It was for this reason alone that defense counsel's statements to the jury about Marcus testifying rang untrue. Under these unique circumstances, the prosecutor should not be able to benefit from a trial strategy change that he provoked.

Similarly unpersuasive is the State's reliance upon ***Lockett v. Ohio*, 438 U.S. 586, 588, 98 S.Ct. 2954, 2956, 57 L.Ed.2d 973 (1978)**. ***Lockett*** held that a prosecutor's closing references to the State's evidence as "uncontradicted" did not impermissibly comment on Lockett's failure to testify where defense counsel "had clearly focused the jury's attention on (Lockett's) silence**." 438 U.S. at 595, 98 S.Ct. at**

2959. The Supreme Court relied on two factors: (1) defense counsel had outlined in his opening statement a detailed "contemplated defense" in the nature of an alibi; and (2) defense counsel stated "to the court and the jury near the close of the case that Lockett would be the 'next witness,' " when in fact she did not testify. These factors are not present in the instant case.

Clearly the more important of the two factors in ***Lockett*** was defense counsel's statement near the close of the case that Lockett would testify. Here, defense counsel made ambiguous references during voir dire that she ""anticipate[d]" that Marcus was going to testify "sometime…depending on the course of the trial." (Tr. 247). She then queried whether anyone believed that they must hear from Marcus before they could find him not guilty (Tr. 247). In her opening statement, defense counsel foreshadowed evidence that they would present about Marcus' actions in the truck and other evidence about which Marcus would testify (Tr. 290-293). But again, at that time, defense counsel "lingered in ignorance" about the prosecutor's untimely endorsement of Jamell Page (Tr. 864-869).

Defense counsel's statements were ambiguous in nature, distant in time from the prosecutor's closing argument, and were made for a different purpose than the statement relied upon in ***Lockett.*** The facts of this case are a far cry from the situation in ***Lockett,*** where the defense counsel unequivocally stated "near the close of the case" that the defendant would be the "next witness." Under the State's view, remarks made by defense counsel during voir dire and opening statement, without knowledge of an untimely mid-trial endorsement that would prompt a change in trial strategy, would

confer a license upon the prosecutor to make repeated direct references to the defendant's failure to testify. Such a view runs roughshod over Marcus's constitutional privilege not to testify.

The error resulting from this direct reference is not harmless. The motivations of the State's key witnesses were suspect since they had been given special treatment by the police for cooperating (Tr. 359, 411). Four of them, Seta, James, Michelle and Ryan had initially lied to the police (Tr. 356-358, 407-408, 410). Furthermore, Marcus's second statement to the police is suspect given the fact that Officer Wilson, who had twice been assaulted by Marcus's brothers, volunteered to interview Marcus a second time (Tr. 927). Wilson had just interviewed Jamell and knew what information he wanted to get out of Marcus (Tr. 904-905, 910, 930-931). In neither of his statements did Marcus confess to knowing that Jamell was going to try and kill Mike (Tr. 812, 922, 932-933). Marcus fully cooperated with the police (Tr. 820).

All of the elements of the murder were attributed to Jamell and the sole question for the jury was what, if any, role Marcus played in the crime. Marcus was the only one who could tell them, and he was forced to change his announced decision to testify. The jury deliberated for over five hours (Tr. 1039-1045). Under these circumstances, the prosecutor's comment was not a "fair response," and whether inadvertent or not, it served to highlight to the jury that they did not hear directly from Marcus.

The trial court abused its discretion in failing to grant the request for a mistrial. This Court must reverse and remand for a fair trial.

CONCLUSION

Because the trial court abused its discretion in granting the State's late endorsement of Jamell Page, Marcus's co-defendant, on the 4th day of trial, which caused Marcus not to testify, after having announced that he would testify during voir dire and opening statement, and in failing to grant a continuance to allow defense counsel adequate time to prepare (Point I), and because the trial court erred in failing to grant a mistrial when the State commented directly on Marcus' right not to testify in closing argument (Point II), Marcus respectfully requests that this Court reverse his convictions and remand for a new trial on all counts.

Respectfully Submitted,

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Certificate of Compliance and Service

I, Amy M. Bartholow, hereby certify as follows:

✓ The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13-point font. According to MS Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, this brief contains **11,565** words, which does not exceed the 31,000 words permitted for an Appellant's Brief in this Court.

✓ The floppy disks filed with this brief contains a copy of this brief. They have been scanned for viruses using a McAfee VirusScan program, which was updated February 15, 2004. According to that program, this disk is virus-free.

✓ True and correct copies of the attached brief and floppy disc were mailed, this 17th day of February, 2004, to Karen Kramer, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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Amy M. Bartholow